

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES.

III. INTERPRETATION AND OBLIGATION.*

B. SPECIFIC QUESTIONS.

4. MATURITY.

The difference between the Anglo-American law and that of the Hague Convention relating to maturity or to the day of payment concerns, in the main, legal holidays and days of grace.⁹¹ Between countries having different calendars a question may arise also regarding the law that shall fix the maturity of the instrument.

Whatever difference of opinion there may be concerning the doctrine of the independence of the different contracts, all are agreed that the date of maturity must be determined alike with respect to all parties. The time of payment being a term of the original contract, all supervening parties must be deemed to have contracted upon the basis of that contract. The question is therefore whether the *lex loci contractus* or the *lex loci solutionis* of the bill or note shall govern.

a. *English Law*: Article 72 (5) provides:

"Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

b. *American Law*: It has been uniformly held that the existence of days of grace is to be determined in accordance with the place of payment of the bill or note.⁹²

*Continued from 1 MINNESOTA LAW REVIEW, p. 338.

91. Days of grace are still allowed in England. B. E. A. Sec. 14.

92. *Bank of Washington v. Triplett*, (1828) 1 Pet. 25, 7 L. Ed. 37; *Vaughan v. Potter*, (1907) 131 Ill. App. 334; *Thorp v. Craig*, (1860) 10 Ia. 461; *Vidal v. Thompson*, (1822) 11 Mart. (La.) 23; *Hammond v. American Express Co.*, (1908) 107 Md. 295, 68 Atl. 496; *Burnham v. Webster*, (1841) 19 Me. 232; *Cribbs v. Adams*, (1859) 13 Gray 597; *Bank of Orange County v. Colby*, (1842) 12 N. H. 520; *Bowen v. Newell*, (1855) 13 N. Y. 290; *Pawcatuck Nat. Bank v. Barber*, (1900) 22 R. I. 73, 46 Atl. 1095; *Bryant v. Edson*, (1836) 8 Vt. 325; 30 Am. Dec. 472; *Walsh v. Dart*, (1860) 12 Wis. 709; *Second Nat. Bank v. Smith*, (1903) 118 Wis. 18, 94 N. W. 664.

c. *German Law*: The law of the place of payment governs in general.⁹³ Article 34 of the General Exchange Law contains an express provision on the subject of calendars, which has the following wording:

"If a bill, payable after date within the Empire (Inland), be drawn in a country reckoning by the old style, and there be no statement thereon, that the bill is dated after the new style, or, if such bill be dated according to both styles, the date of maturity is to be reckoned according to the day of the calendar of the new style which corresponds with the day of drawing according to the old style."

This article applies the calendar of the place of issue but it deals only with the case where a bill is drawn on Germany from a country having the old style and is payable after date. If the bill is payable on a particular day, the German calendar controls.⁹⁴ Where a bill payable after date is drawn in Germany on a country with the old style, the rule contained in Article 34 is not applied by way of analogy and the date of maturity is determined in accordance with the calendar at the place of payment.⁹⁵

d. *Italian Law*: There is no provision in the Italian codes on the subject. Most of the Italian authors⁹⁶ apply the law of the place of issue where the calculation of the date of maturity depends upon the question of a difference in the calendars.

The law and juristic opinion of the different countries agree that the law of the place of payment should determine the day of payment when the day of maturity falls on a Sunday or a legal holiday.⁹⁷ The same agreement exists also in the matter of days of grace, which are controlled by the same law.⁹⁸ Most

93. R.G. Dec. 11, 1895 (6 Niemeyer 429). In this case a bill was drawn from Germany on Portugal, payable three months after date. The question involved was whether the three months should be understood as calendar months or as ninety days.

Art. 35 of the German Exchange Act has the following provision:

"Bills payable at a fair or market become due in accordance with the local law of the fair or market place, and, failing such fixed date, on the day before the legal close of the fair or market. If the fair or market lasts for one day only, the bill becomes due on that day."

94. Staub, Art. 34, Sec. 4.

95. Staub, Art. 34, Sec. 5.

96. See Ottolenghi, p. 276.

97. Von Bar, p. 674; Diena, III, p. 147; Champcommunal, Annales, 1894, II, p. 204; Esperson, p. 90; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Ottolenghi, p. 268.

98. Audinet, p. 614; von Bar, p. 674; Champcommunal, Annales, 1894, II, pp. 204-205; Beauchet, Annales, 1888, p. 69; Chrétien, p. 148;

of the authors feel the question involved in the above cases does not affect the maturity of the instrument in any true sense whatever, but only the precise day or incidents of payment, and like all matters affecting payment, should be subject to the law of the place of payment.⁹⁹ As the question is closely connected with the business usages and policies existing at the place of payment, the law of the place of payment should control in the nature of things and every party must be regarded as having contracted with reference to the law there existing.¹⁰⁰

Great diversity of opinion exists, however, in regard to the question of calendars. Some authors are of the opinion that the question affects the substance of the original contract so that the law of the place of issue should control.¹⁰¹ Others bring it within the operation of the *lex loci solutionis* of the bill or note on the alleged ground that it relates to the performance of the contract.¹⁰² The law of the place of payment of the bill or note has been accepted also by the Bills of Exchange Act and by the Convention of the Hague.¹⁰³ As this rule appears to conform also to the practice of bankers, it should be adopted by the Uniform Act.¹⁰⁴

5. PRESENTMENT FOR ACCEPTANCE.

a. *English Law*: The Bills of Exchange Act provides that "the duties of the holder with respect to presentment for accept-

Despagnet, p. 994; Esperson, p. 90; Diena, III, p. 150; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Massé, I, p. 571; Rolin, II, No. 963; Surville et Arthuys, pp. 680-81; Ottolenghi, pp. 290-91; Weiss, IV, p. 465.

99. See, for example, Grünhut, II, p. 585; Ottolenghi, p. 290.

100. Contra, Staub, Art. 86, Secs. 1, 9, who contends that the allowance of days of grace would change the day of maturity.

101. Audinet, p. 614; Champcommunal, Annales, 1894, II, p. 201; Chrétien, p. 142; Jitta, II, pp. 81, 111; Surville et Arthuys, pp. 676-77; Despagnet, p. 994.

102. Von Bar, p. 675; Esperson, p. 89; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Massé, I, pp. 570-71; Weiss, IV, pp. 465-66. Compare Diena, III, pp. 144-46; Ottolenghi, p. 265-66.

103. Art. 36, Uniform Law.

104. Where the day of payment is a certain time after date the actual date must, of course, be understood.

"As regards the calendar," says von Bar, "we must start with this consideration, that the person who issues the bill imposes its conditions, and these he must express in the way in which they will be most easily understood at the place of payment. That is effected by fixing the day of payment according to the calendar that is in use at the place of payment. The matter stands otherwise if the day of payment is fixed at the expiration of a particular period from the date of the bill. The date is the day on which the bill is truly completed,

ance . . . are determined by the law of the place where the act is done or the bill is dishonoured."¹⁰⁵

b. *American Law*: It has been held that the right of immediate recourse for non-acceptance is subject to the law governing the contract of the party sought to be charged.¹⁰⁶ While no cases have been found respecting the duty of presentment for acceptance, the same law will doubtless apply.

c. *French Law*: The provisions of the French code are admitted by the French writers themselves to be illogical and indefensible.¹⁰⁷ According to Article 160 of the Commercial Code the time for presentment of drafts payable after sight drawn in France on a foreign country is determined by French law, which governs likewise where a draft is drawn in a foreign country on France.

d. *Italian Law*: The only relevant provision of the Italian law is contained in Section 261 of the Commercial Code which provides that when, during times of maritime war, a sight draft is drawn in Italy on a foreign country, the time of presentment for acceptance shall be double the ordinary period. Ottolenghi¹⁰⁸ is of the opinion that this section accepts the law of the place where the contract is made as controlling the time within which presentment for acceptance must be made.

Of the text writers the older authors regarded the duty of the holder to present the instrument for acceptance and the time of such presentment as a part of the performance of the exchange contract, and as subject, therefore, to the law of the place where the presentment was to be made.¹⁰⁹ Today the jurists generally agree in looking upon the question as one affecting the obligation of the various contracts, as distinguished from their performance. According to this view the *lex loci contractus* of the individual contracts would determine the duties of the holder.¹¹⁰

not the day, which is described by the same title in another calendar, but is, of course, a different day altogether." P. 675.

105. B. E. A. Sec. 72 (3).

106. *Aymar v. Sheldon*, (1834) 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

107. See Despagnet, p. 994; Lyon-Caen et Renault, IV, p. 562.

108. P. 183.

109. Pothier, *Du Contrat de Change*, No. 155.

110. Audinet, p. 615; Champcommunal, *Annales*, 1894, II, p. 152; Diena, III, pp. 110, 113-14; Jitta, II, p. 91; Lyon-Caen et Renault, IV, p. 562; Ottolenghi, pp. 165-66.

Fiore still favors the law of the place of payment of the bill or note. Fiore, I, p. 164.

A number of authors, in a desire to have one law govern this question, suggest, however, that the law of the drawer's contract should control.¹¹¹ This is also the recommendation of the Institute of International Law.¹¹² As each party is free to stipulate in regard to the question before us, it would seem clear upon principle that it affects the obligation of contracts, that is, the conditions upon which each individual contract was made. The *lex loci contractus* of the different parties should be adopted, therefore, by the Uniform Act as the rule governing the necessity and time of presentment for acceptance, unless considerations of policy require a deviation from strict theory. A strict adherence to the doctrine of the independence of the different contracts may lead here to the result that the presentment may be sufficient as to some parties and insufficient as to others, so that the rights of recourse of the former against the latter may be cut off. Because of this fact a single law has been advocated. Many authors, as well as the Institute of International Law, favor, as we have seen, the *lex loci contractus* of the drawer's contract. The Bills of Exchange Act, on the other hand, has adopted "the law of the place where the act is done, or the bill is dishonoured." Massé¹¹³ would distinguish between the necessity and the time of presentment and would apply the *lex loci contractus* of each contract with regard to the necessity of presentment and the *lex loci contractus* of the drawer's contract as regards the time of presentment.

If a single law must be found the author would prefer the rule of the Bills of Exchange Act. A comparative study of the law of Bills and Notes of England and the United States and that of the Convention of the Hague has not convinced him, however, of the necessity of a departure from principle. The two systems agree as to the necessity of presentment except that the Bills of Exchange Act¹¹⁴ and the Negotiable Instruments Law¹¹⁵ require a presentment for acceptance also in the relatively infrequent case where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. As regards the time within which presentment must be made, the Anglo-

111. Audinet, p. 612; Champcommunal, *Annales*, 1894, II, p. 152; Chrétien, p. 122; Esperson, pp. 41-45; Surville et Arthuys, p. 677.

112. *Annuaire*, VIII, p. 122, Resolution IV.

113. I, p. 570.

114. Sec. 39 (2).

115. N. I. L. Sec. 143 (3).

American law prescribes a reasonable time,¹¹⁶ while that of the Convention of the Hague¹¹⁷ lays down the definite period of six months. No serious differences exist, therefore, between the two systems from which untoward results might be feared in consequence of the strict application of the doctrine of the independence of the different contracts. Under these circumstances no actual hardship is imposed upon the holder.

The *lex loci contractus* of the different contracts determines also the question whether the holder can safely accept a qualified acceptance.¹¹⁸ The point involved is again whether the drawer or indorser has agreed to be responsible in such a case. The same law must control the right of recovery for non-acceptance.¹¹⁹

Everything connected with the mode of presentment for acceptance is governed, on the other hand, by the law of the place where such presentment is to be made. The question also whether an acceptance, once given, may be revoked is determined by this law.¹²⁰ It will decide likewise, in the nature of things, the duty of the drawee to accept.¹²¹

6. PRESENTMENT FOR PAYMENT AND NOTICE.

Important differences continue to exist between Anglo-American law and that of the Hague Convention as regards the requirements of protest and notice. What is the law that should govern in this matter?

a. *The Necessity of Presentment, Protest and Notice.* The law governing the necessity of presentment for acceptance has been discussed already.¹²² The requirement of protest and notice

116. N. I. L. Sec. 144; B. E. A. Sec. 40 (1)

117. Art. 22, Uniform Law.

118. Diena, III, p. 124; Grünhut, II, p. 580; Ottolenghi, p. 199. Contra: Champcommunal, Annales, 1894, II, p. 156, who applies the *lex domicilii* of the acceptor.

119. Aymar v. Sheldon, (1834) 12 Wend. (N. Y.) 439; 27 Am. Dec. 137; Diena, III, p. 133; Esperson, p. 67; Ottolenghi, No. 79.

120. Chrétien, p. 129; Ottolenghi, p. 197.

121. Audinet, p. 612; Diena, III, pp. 118-119, 193; Lyon-Caen et Renault, IV, p. 558; Ottolenghi, p. 191; Weiss, IV, pp. 442, 460.

122. A wide difference existed formerly between Anglo-American and Continental law in the right of recourse upon the non-acceptance of a bill. Such a right was denied generally upon the continent, the holder being entitled only to security that the bill would be paid at maturity. The Convention of the Hague has accepted the Anglo-American view in this regard.

The question was regarded as relating to the obligation of the different parties and as subject, therefore, to the *lex loci contractus* of the drawer's or indorser's contract. Audinet, pp. 620-21; Chrétien,

of dishonor in case of non-acceptance may be considered in this connection.

Three different views have been expressed concerning the law governing the necessity of presentment for payment and the necessity of protest and notice upon dishonor, for non-acceptance or non-payment.

First view: These requirements are to be regarded as a part of the obligation of the contract of the different parties, that is, as conditions upon which they have agreed to pay. According to this view the *lex loci* of each contract should govern the question. This rule has the sanction of the French,¹²³ German¹²⁴ and Italian¹²⁵ courts. It represents also the majority doctrine in this country¹²⁶ and is supported by the great weight of judicial opinion everywhere.¹²⁷

Second view: The law of the place of payment controls as to all parties. This is the view of the Bills of Exchange Act. Section 72 (3) reads as follows:

"The duties of the holder with respect to presentment for acceptance or payment and the necessity for, or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act¹²⁸ is done or the bill is dishonoured."

With respect to protest the view expressed in the above section was followed by some of the old authors, who regarded the question as relating to the performance of the original contract

p. 135; Diena, III, p. 133; Esperson, pp. 67-68; Lyon-Caen et Renault, IV, pp. 559-60.

123. Trib. de Com. de la Seine, Apr. 6, 1875 (3 Clunet 103).

124. Staub, Art. 86, Secs. 5-9.

125. Cass. Florence, Apr. 8, 1895 (S. 1896, 4, 7), cited by Audinet, p. 618, note.

126. *Holbrook v. Vibbard*, (1840) 2 Scam. (Ill.) 465; *Allen v. Merchants Bank of New York*, (1839) 22 Wend. (N. Y.) 215; 34 Am. Dec. 289; *Amsinck v. Rogers*, (1907) 189 N. Y. 252; 82 N. E. 134; 121 Am. St. Rep. 858; 12 L. R. A. (N.S.) 875; *Read v. Adams*, (1821) 6 Serg. & R. (Pa.) 356; *Warner v. Citizens Bank of Parker*, (1894) 6 So. Dak. 152, 60 N. W. 746; *Douglas v. Bank of Commerce*, (1896) 97 Tenn. 133, 36 S. W. 874; *Raymond v. Holmes*, (1853) 11 Tex. 54; *Guernsey v. Imperial Bank of Canada*, (1911) 188 Fed. 300.

127. Von Bar, p. 677; Asser, p. 210; Beauchet, *Annales*, 1888, II, p. 66; Audinet, pp. 618, 620; Despagnet, pp. 994-95; Diena, III, p. 170; *Principi*, II, p. 315; *Grünhut*, II, p. 581; *Massé*, I, p. 569; *Meili*, II, p. 347; *Ottolenghi*, pp. 366-67; *Schäffner*, p. 122; *Valéry*, p. 1288.

128. Westlake suggests that the word "acts" includes also "omissions." P. 330.

and as subject, therefore, to the law of the place of payment.¹²⁹ A few of the modern writers also favor the law of the place of payment.¹³⁰

Third view: The law of the place of issue of the original contract governs as to all parties. This view is supported by a number of authors¹³¹ and is accepted by the Institute of International Law as regards the necessity of presentment.¹³²

In accordance with the principle of the independence of the different contracts upon bills and notes there can be no doubt that on principle the law governing the different contracts must determine the conditions upon which each party has assumed liability. The necessity of presentment, protest and notice belongs clearly to the obligation of the contracts of the different parties, constituting the conditions upon which they have assumed liability, and must be subject, therefore, to the law of the place which controls the liability of the different parties. An abandonment of this rule in favor of the law of the place of payment or of the law of the place of issue of the original contract, is tantamount to a rejection of the whole doctrine of the independence of the different contracts. The author has taken the position that there is no sufficient reason for a complete departure from this fundamental principle in the law of bills and notes. To his mind the convenience of complying with a single law instead of satisfying the law of different jurisdictions does not justify an overthrow of the traditional rule which regards the contracts of the drawer and of the indorsers as indemnity contracts, performable in the state where they were made.

From the standpoint of practicability the *lex loci contractus* of the several contracts is free from objection in so far as the necessity of presentment, protest and notice is concerned. Each one of these acts is customarily done without regard to the legal necessity for so doing, so that a rule which might impose such a necessity by virtue of the *lex loci contractus* of a particular contract would constitute no real burden.

Shall the same law determine also the question whether some substitute for the customary protest may be allowed? Under the

129. Brocher, *Cours*, II, pp. 317-18; Pothier, *Traité du Contrat de Change*, No. 155.

130. Lyon-Caen et Renault, IV, p. 563.

131. Esperson, p. 151.

132. *Annuaire*, VIII, p. 122. Resolution IV.

law of the Hague Convention each contracting state may prescribe that with the assent of the holder, protests to be drawn within its territory may be replaced by a declaration dated and written upon the bill itself, signed by the drawee, and transcribed in a public register within the time fixed for protest.¹³³ This practice appears to exist in Italy and in Belgium. Some authors would apply again the *lex loci contractus* of the different contracts.¹³⁴ Others are of opinion that the law of the place where the presentment is to be made should control.¹³⁵ According to this view the contract is interpreted as requiring only that the dishonor of the bill or note shall be indicated in some authentic manner, the mode of authentication being left to the law of the place where the act is to be done. The latter view is also that of the Institute of International Law.¹³⁶ The balance of convenience is in its favor.

b. *The Time and Mode of Presentment, Protest and Notice.* All courts and authors as well as legislative provisions agree that the law of the place where the presentment and protest is to be made should determine the formalities with which such acts should be executed. All parties, including the drawer and indorser, will be deemed to have contracted with reference to the law of that state. This law clearly controls the manner of presentment and protest. It determines for example, the persons by whom presentment and protest may be made; the place where and the time of day when such presentment may be made; and whether a "noting" on the day of maturity is sufficient. We have seen in connection with the maturity of bills and notes that the precise day of payment, where the day of maturity falls on a Sunday or a legal holiday, or where days of grace are allowed, is ascertained with reference to the law of the place of payment. The same rule would hold, no doubt, where the law of the place of payment does not recognize days of grace, but permits presentment and protest on one of the two business days following the day of maturity as is the case under the Convention of the Hague.¹³⁷

133. Art. 9 of Convention.

134. Champcommunal, *Annales*, 1894, II, p. 216.

135. Diena, III, p. 175; Grünhut, II, p. 578; Ottolenghi, pp. 368-69.

136. *Annuaire*, VIII, p. 122. Resolution V provides that the law of the place where payment is to be made determines the mode of showing default of acceptance or payment, and the form of protest.

137. Art. 37, Uniform Law.

There is no harmony, however, concerning the law governing the mode of notification, as to which wide differences exist between the Anglo-American law and that of the Hague Convention.¹³⁵

(1) *English Law*: Section 72 (3) of the Bills of Exchange Act provides that "the sufficiency of a protest or notice of dishonour" . . . is "determined by the law of the place where the act is done or the bill is dishonoured." This provision follows the decisions of *Rothschild v. Currie*¹³⁹ and *Hirschfeld v. Smith*.¹⁴⁰

(2) *American Law*: The American cases are divided upon the question. The majority¹⁴¹ hold that the law governing the different contracts should control. A minority¹⁴² apply the law of the place of payment of the bill or note.

(3) *German Law*: Article 86 of the General German Exchange Law provides expressly:

"As regards the form of the proceedings for the exercise or maintenance of exchange rights on a bill at a foreign place, the local law in force decides."

138. Article 44 of the Uniform Law provides as follows:

"The holder must give notice of non-acceptance or non-payment to his indorser and to the drawer within the four business days which follow the day of protest or, in case of the stipulation 'return without costs,' within the four business days which follow the presentment.

"Each indorser must within two days give notice to his indorser of the notice which he has received, indicating the names and addresses of those who have given the preceding notices, and thus in succession back to the drawer. The limit of time above indicated shall run from the receipt of the preceding notice.

"In a case where an indorser has not indicated his address or has signed in an illegal manner, it shall suffice if notice is given to the preceding indorser.

"A party who has to give notice may do so in any form, even by the simple return of the bill of exchange. He must prove that he has done this within the time prescribed.

"This time limit shall be deemed to have been observed if an ordinary letter giving the notice has been mailed within the said time.

"The party who does not give notice within the time above indicated shall not lose his right of recourse; he shall be responsible for the injury, if any has occurred, caused by his negligence, but the damages shall not exceed the amount of the bill of exchange."

139. (1841) 1 Q. B. 43, 4 P. & O. 737.

140. (1866) L. R. 1 C. P. 340.

141. *Snow v. Perkins*, (1851) 2 Mich. 238; *Thorp v. Craig*, (1860) 10 Ia. 461; *Raymond v. Holmes*, (1853) 11 Tex. 55; *Aymar v. Sheldon*, (1834) 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

142. *Wooley v. Lyon*, (1886) 117 Ill. 248, 6 N. E. 885, 57 Am. Rep. 867; *Guernsey v. Imperial Bank of Canada*, (1911) 188 Fed. 300.

This section is held applicable to the form and sufficiency of notice.¹⁴³

Which of the above rules should be adopted by the Uniform Law?

The reasoning of *Rothschild v. Currie* in favor of the law of the place of payment of a bill or note must be rejected for the reason that it is based upon the theory that the drawer and indorsers agree to pay at the place of payment of the bill or note. The case of *Hirschfeld v. Smith*, however, advanced a second reason in support of the law of the place of payment. Erle, C. J., says:¹⁴⁴

"If the reason assigned in that case (*Rothschild v. Currie*) be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser unless he has given due notice of dishonour according to the law of England, then the question is, what notice, under such circumstances, amounts to due notice? . . . The indorser of a bill accepted payable in France, promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France, relating to the dishonour of bills; and notice of dishonour is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonour has been sent to him, yet the notice of dishonour according to the law of France may be, and we think ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law.

"It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonour, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice valid according to the law of the place should be held to be reasonable notice for each of the countries of each of

143. Staub, Art. 86, Sec. 3; Beauchet, *Annales*, 1888, II, p. 67, note.

144. (1866) L. R. 1 C. P. 340, 352.

the parties, unless an exceptional case should give occasion for an exception."

In the opinion of the learned Chief Justice, therefore, even if the indorser's contract is subject to the law of the place where he entered the contract, the indorser must be regarded as having contracted, as regards the sufficiency of notice, with reference to the law of the place where the bill is payable. The same view is strongly advocated by a late federal case, in which Judge Sanborn uses the following language:¹⁴⁵

"The rule that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement, is impractical, unfair, and unjust, because the notary at the place of payment must give the notice, and it is often impossible in the time allowed to him by the law for him to find out where each indorsement was made and what the law of the place of each indorsement is upon the subject of notice of dishonor. On the other hand, commercial paper shows on its face where it is payable. Each indorser, when it is presented to him for his indorsement, has time and opportunity before he signs it, to learn where it is payable to ascertain if he desires the law of that place, and to decide for himself with full knowledge and upon due consideration whether or not he will agree to pay the amount specified therein if the maker fails to do so and the paper is presented, the payment is demanded, the protest is made, and the notice of dishonor is given according to that law. In the decisions upon this question there is a direct and irreconcilable conflict. The established rule in England, the rule in Illinois, and the stronger and better reasons are that, where an indorsement is made in one jurisdiction, and the commercial paper is payable in another, the manner of giving notice of dishonor and the sufficiency thereof are governed by the law of the place where the paper is payable."

The majority view in this country looks upon the sufficiency of notice as an implied condition upon which the liability of the drawer and indorser is to attach and which is subject, therefore, to the law governing their respective contracts. The foreign writers are divided on this point. Most¹⁴⁶ of them seem to feel that the sufficiency of notice, like the mode of presentment and protest, should be controlled by the law of the place of payment of the bill or note. From the standpoint of strict theory the question differs from that touching the mode of

145. (1911) 188 Fed. 300, at p. 302.

146. Asser, p. 210; Beauchet, *Annales*, 1888, II, pp. 67-68; Grünhut, II, p. 578; Meili, II, p. 346.

Contra and in favor of the *lex loci* of each contract, von Bar, p. 677; Diena, III, pp. 196-97; Ottolenghi, pp. 452-53.

presentment and protest in that it relates not so much to the manner of doing the prescribed act as to its sufficiency as notice to the drawer and indorser. It would affect, therefore, the obligation of their contracts, that is, the conditions upon which liability was assumed. It must be admitted, however, that the difference between the conditions of liability and matters affecting the mode of performance is ultimately one of degree. As no absolute line can be drawn, considerations of convenience may well be invoked in the solution of the question. The writer is strongly of the opinion that the considerations advanced by Chief Justice Erle and Judge Sanborn are entitled to the greatest weight and that the law of the place of payment, which is accepted by the law of England and Germany, and by the Institute of International Law, should be approved by the Uniform Act. The other view, which makes it incumbent upon each holder to notify a party whom he seeks to charge with legal liability in strict accordance with the law governing the latter's contract, is unreasonable. As far as the drawer and indorser is concerned the suggested rule would not operate more to his disadvantage than the rule now prevailing in Anglo-American law which extends the liability of the drawer or indorser in case of delay in giving notice of dishonor when such delay is caused by circumstances beyond the control of the holder which are not imputable to his default, misconduct or negligence.¹⁴⁷ It will follow that if the last holder is authorized to notify all the prior parties, and he does so, according to the law of the place of payment, their liability will be fixed. But suppose that the holder of the instrument at the time of maturity notifies only his immediate indorser, which law is to determine the time and manner of notice to be given by such indorser to the antecedent parties? The Bills of Exchange Act, Section 72 (3), appears to say that the sufficiency of notice by any holder is governed by the law of the place where the bill is dishonored. But this would be opposed to the English law as stated by the court of appeal in *Horne v. Rouquette*.¹⁴⁸ Westlake¹⁴⁹ believes that this subdivision should be applied only to the last holder, and that in all other cases, in conformity with the general rule governing the interpretation of the drawing and indorsement,¹⁵⁰ the *lex loci contractus* of the drawer's or in-

147. N. I. L. Sec. 115; B. E. A. Sec. 50 (1).

148. (1878) L. R. 3 Q. B. D. 514.

149. P. 321.

150. B. E. A. Sec. 72 (2).

dorser's contract must be satisfied. Daniel,¹⁵¹ on the other hand, is of the opinion that each intermediate indorser could notify any prior indorser or the drawer, in accordance with the law of his own land. The most convenient rule would be, no doubt, to allow each party to give notice in the manner prescribed by the law of the state where such notice is to be given. This appears to be the meaning also of Resolution 5, paragraph 2 of the Institute of International Law.¹⁵² The author would recommend that the Uniform Act adopt this rule.

7. VIS MAJOR.—MORATORY LAWS.

a. *Vis Major*. In Anglo-American Law any delay in presentment, protest and notice is excused^{152a} when caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence, and such requirements are dispensed with,¹⁵³ if, after the exercise of reasonable diligence, they cannot be made. The Convention of the Hague allows such an excuse only in case presentment or protest is prevented by an insuperable obstacle (*vis major*).¹⁵⁴ Matters purely personal to the holder or to the person intrusted with the presentment of the instrument or with the drawing of the protest are not regarded as constituting cases of *vis major*.

Which is the law governing the question whether a delay in presentment, protest or notice is excusable?

Most authors¹⁵⁵ regard the question as relating to the obligation assumed by the drawer and indorser and as subject, therefore, to the *lex loci contractus* of their respective contracts. Others¹⁵⁶ are of the opinion that any delay in presentment, protest or notice

151. P. 1093.

152. *Annuaire*, VIII, p. 122. The resolution provides as follows: "The notices to be given to the guarantors for the preservation of the rights of recourse in case of default of acceptance of payment, and the time within which such notices must be given, are governed by the law of the country from which such notices must be sent."

152a. N. I. L. Sec. 81, 113, 147, 159; B. E. A. Secs. 46 (1), 50 (1), 39 (4), 51 (9).

153. N. I. L. Secs. 82 (1), 112, 148 (2), 159; B. E. A. Secs. 46 (2) (a), 50 (2) (a), 41 (2) (b) 51 (9).

154. Art. 53, Uniform Law. The German Bills of Exchange Law of 1849 does not excuse any delay on account of *vis major*. Staub, Art. 41. Sec. 3.

155. Von Bar, p. 684; Champcommunal, *Annales*, 1894, II, p. 218; Chrétien, pp. 184-185; Despagnet, p. 996; Lyon-Caen et Renault, IV, p. 567; Ottolenghi, p. 430; Surville et Arthuys, p. 686; Weiss, IV, pp. 463-64.

156. Diena, III, pp. 183, 185; Jitta, II, p. 139; Massé, I, pp 569-70.

caused by vis major should be controlled by the law of the place of payment of the bill or note. The Institute of International Law considers the law of the place of the original issue of the instrument to be the appropriate law.¹⁵⁷

The principle of the independence of the different contracts on a bill or note makes it impossible to accept the view recommended by the Institute of International Law, for there is no reasonable basis for the assumption that the different parties contracted with reference to the *lex loci contractus* of the drawer's contract as regards the defense now under consideration. The defenses which each party can interpose in an action against him are controlled by the *lex loci contractus* of the individual contract, except when they relate to the nature of the interpretation of the original contract or to the mode of performance. As the defense of vis major has no connection with the nature of interpretation of the original bill or note, it will be controlled necessarily by the *lex loci contractus* of each contract unless it can be said to belong to the incidents of performance. When the vis major operates to excuse presentment, protest or notice altogether, the question relates clearly to the substance of the obligation of the different contracts, that is, to the conditions upon which the parties assumed liability, and is controlled, therefore, by the law governing their respective contracts. On the other hand, when the vis major is relied upon solely for the purpose of excusing a delay in the presentment, protest or notice, it would seem that the law of the place where the acts are to be done should control the question. This law determines the precise day on which these acts must be done with respect to days of grace, Sundays and holidays, and the time for protesting in general, and should control whenever conditions constituting vis major under the law of such state exist.

b. *Moratory Laws.* Does the rule governing the defense of vis major apply where by reason of some great public necessity or calamity the time of payment or the time for protesting the instrument is postponed by legislation? This question has been discussed a great deal as a result of the French moratory legislation during the Franco-Prussian war. There can be no doubt concerning the validity of such legislation as regards persons who were subject to French law. Most of the countries upheld the French legislation even with respect to foreign in-

157. *Annuaire*, VIII, p. 122, Resolution VI.

dorsers.¹⁵⁸ A vast literature has arisen upon the subject which has been collected in Goldschmidt's *Zeitschrift für das gesammte Handelsrecht*.¹⁵⁹ Much of the controversy arose from the nature of the specific legislation involved, which postponed the time of payment of bills payable in France from month to month for a period aggregating eleven months. The legislation spoke now of the postponement of the maturity, now of the postponement of the time for protesting, and finally forbade the protesting. No attempt will be made here to discuss the French legislation. The problem can be considered only in its general aspects. Where the moratory legislation takes the form of an extension of the time within which presentment and protest may be made, it has been contended with great force that the law of the place of payment of the bill or note should control by virtue of the rule universally recognized as regards days of grace.¹⁶⁰ Diena¹⁶¹ holds the view that the day of maturity remains unaffected by such moratory legislation as the French and that there has been in reality only "a postponement of the day on which payment can be demanded." Von Bar¹⁶² maintains, on the other hand, that "it is merely playing with words to say that days of grace may just as well last for seven or eleven months as for two to ten days." The writer agrees with the view that the law of the place of payment of a bill or note should govern with respect to the moratory legislation of the type now under consideration. Days of grace exist on grounds of policy whose object is the protection of the

158. England: *Rouquette v. Overman*, (1875) L. R. 10 Q. B. 525. Austria: OGH May 28 & June 13, 1872, cited by Jettel, p. 119. See also Austro-Hungarian Court at Constantinople, Apr. 15, 1872 (1 Clunet 100). Belgium: Brussels, Apr. 29, 1872 (1 Clunet 209) Ghent, May 15, 1873 (1 Clunet 213). France: App. Aix Apr. 9, 1872 (D. 1872. 2. 202). Italy: Cass. Turin, March 6, 1872 (Annali 1872. 1. 107); App. Rome, June 12, 1872 (Annali 1872. 2. 266); Cass. Florence, Jan. 16, 1873 (Annali 1873. 1. 47); App. Milan, Apr. 4, 1873 (1 Clunet 138); Cass. Turin, May 20, 1879 (Annali 1897. 1. 405). Sweden: Sup. Court of Sweden, May 14, 1873 (1 Clunet 149). Switzerland: Court of Geneva, March 25, 1872 (Rev. de Dr. Int. 1872, p. 660).

A few courts, however, reached a different conclusion, notably the Supreme Commercial Court of the German Bund in its decision of February 21, 1871 (1 ROHG 288); also App. Milan, April 16, 1872 (Annali 1872. 2. 139).

159. XVII. pp. 294-09, XVIII, pp. 625-43.

160. That days of grace may be allowed by the law of the place of payment after the contract of the drawer or indorser has been entered into, is generally conceded. Von Bar, p. 683, note; Chrétien, p. 192; Lyon-Caen et Renault, IV, p. 568.

161. Diena, III, p. 189; Principi, II, pp. 316-17.

162. P. 683.

debtor against the serious consequences of loss of credit, immediate execution and possible bankruptcy which may follow upon the dishonor of commercial paper. Moratory laws aim to protect the credit or financial interests of a nation in the case of public crisis by giving to its people time within which to pay obligations which are conceded to be due. The difference in the length of time during which such grace is allowed cannot affect the principle.¹⁶³

The law of the place of payment should govern equally when the moratory legislation prohibits the protesting of bills and notes during a specified period. Such legislation creates a situation of *vis major* operating merely as an extension of the time within which the protest can be made. In accordance with the ordinary rules governing *vis major* which have been laid down above, the law of the place of payment of a bill or note should control.¹⁶⁴

The moratory legislation should be regarded as invalid, however, if it takes the form of an extension of the date of maturity. Even in the absence of constitutional limitations no state can be regarded as having the power to effectuate such a change in the contract of the parties, except with respect to persons that are subject to its jurisdiction. The legislation cannot bind parties to bills and notes who assumed their obligations in a foreign country.¹⁶⁵ Some of the writers are of the opinion that even in this case the legislation might be sustained on the theory that it constitutes, so far as the holder is concerned, a case of *vis major*.¹⁶⁶ In order that a case of *vis major* in any true sense can be made out, the protesting of the instrument on the day of its original maturity must be rendered impossible, or at least illegal. If a protest can be lawfully made on the day of the original maturity of the bill or note, there is no reason why the holder who wants to preserve his right or recourse against a foreign drawer or indorser should not make the presentment and protest in accordance with the strict terms of the contract of such drawer or indorser. When the moratory legislation purporting

163. Diena, III, pp. 190-91. See also Ottolenghi, p. 436; Despagnet, p. 997; Weiss, IV, p. 466.

164. Chrétien, p. 192; Despagnet, pp. 997-98; Lyon-Caen et Renault, IV, p. 568.

165. Chrétien, p. 193; Lyon-Caen et Renault, IV, p. 568.

166. Weiss IV, p. 466, note; Champcommunal, Annales, 1894, II, p. 250.

to extend the date of maturity allows a recovery of interest from the original date of maturity the substance of the contract would not, in reality, be affected but solely the time and mode of its performance, so that the law of the place of payment of the bill or note should govern.¹⁶⁷

The English case of *Rouquette v. Overman*,¹⁶⁸ which sustained the French legislation, gives three reasons for the application of the law of the place of payment of a bill or note. First—the question affects the “incidents of presentment and payment” and is subject, therefore, to the law of the place of payment. Second—the indorser’s contract calls for performance at the place of payment of the bill or note and is controlled therefore by that law. Third—a contrary doctrine, which might allow recourse against the drawer and indorsers before the obligation of the principal debtor has become due, would constitute a startling anomaly.

In an earlier part of this article it has been shown that the contract of the drawer and indorser is one of indemnity, which is to be performed in the place where it is entered into and not at the place of payment of the bill or note. The second ground set forth in the above opinion cannot, therefore, be accepted. The third argument, namely, that the application of the *lex loci contractus* of the different parties would lead to the anomaly that recourse might be taken against the drawer and the indorsers before the obligation of the principal debtor has become due, is of no conclusive character, as anomalies, in the nature of things, must result from such anomalous legislation. The extent to which the reason first advanced, namely, that the question affects the incidents of presentment and payment, can be accepted, has been shown above.

There is no reasonable basis for the assumption that all parties contracted with reference to the *lex loci contractus* of the original contract and for that reason the recommendation of the Institute of International Law, which favors that rule,¹⁶⁹ must be disapproved.

8. PAYMENT.

There is perfect agreement in the law of the different countries concerning the rule governing the mode of payment. In the

167. Diena, III, pp. 189-90. See also Jitta, II, p. 140.

168. (1875) L. R. 10 Q. B. 525.

169. *Annuaire* VIII, p. 122, Resolution VI.

nature of things the law of the place of payment controls. Unless the bill or note specifies that payment is to be made in a particular coin, the law of the place of payment will determine the kind of currency in which the instrument may be paid.¹⁷⁰

The above rule is regarded as controlling also certain other matters relating to payment; for example, whether a party liable on a bill or note may discharge his liability by payment of the amount into court,¹⁷¹ and when payment through a clearing house¹⁷² becomes irrevocable.

Shall the same rule be applied also where the amount of a bill or note is indicated in a kind of money having the same designation in the country of issue and in the country where the payment is to be made, but there is a difference in its value? Suppose, for example, that a bill is drawn in New York on the city of Mexico for \$1,000. If the bill calls for Mexican dollars it will represent only half the value it would possess if it were interpreted to mean dollars of the United States. Most authors¹⁷³ answer the question in the affirmative. Others¹⁷⁴ maintain that the law of the place of payment controls only the *mode* of payment, and that the question under consideration relates to the interpretation of the principal contract. The law of the place of payment is adopted as the governing law by the Convention of the Hague,¹⁷⁵ and this law would appear to be entitled to preference. As the amount is payable at the place of payment it would seem as if the money current at such a place must have been intended by the parties, in the absence of a clear expression to the contrary. All parties to the instrument must be regarded as having con-

170. Diena, *Principi*, II, pp. 253-54; Audinet, p. 616; Jitta, II, p. 110; Lyon-Caen et Renault, IV, p. 554; Ottolenghi, pp. 305-06; Surville et Arthuys, pp. 682-83; Valéry, p. 1287; Weiss, IV, p. 466.

Many authors would apply the same rule though paper money has been substituted as legal tender since the making of the contract. Chrétien, pp. 159-62; Ottolenghi, pp. 313-14; Surville et Arthuys, pp. 682-83.

171. Diena, III, p. 154; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, 563.

172. Lyon-Caen et Renault, IV, p. 563.

173. Von Bar, p. 674; Esperson, p. 97; Fiore, I, p. 223; Lyon-Caen et Renault, IV, p. 262; Massé, I, p. 546; Rolin, II, p. 543. See also, Ottolenghi, pp. 308-09.

174. Champcommunal, *Annales*, 1894, II, p. 208; Chrétien, p. 153; Lyon-Caen et Renault, IV, p. 262; Surville et Arthuys, p. 676.

175. Art. 40, par. 2, Uniform Law.

tracted upon this basis, so that the question is unaffected by the *lex loci contractus* of the drawer's or indorser's contract.¹⁷⁶

Under the Convention of the Hague the holder of a bill of exchange must accept partial payment.¹⁷⁷ According to Anglo-American law he is not required to do so. It has been suggested that the duty of the holder in this regard should be regarded as relating not to the mode of payment but to the obligation of the different contracts and should be governed, therefore, by the *lex loci contractus* of each contract.¹⁷⁸ This view point would lead, however, to totally impracticable results and must be rejected, if for no other reason, on that ground alone. The holder must either accept part payment or not accept it, and he is not in a position to comply with conflicting laws. One law must control, and inasmuch as the question relates to payment the law of the place of payment is the logical rule to adopt.¹⁷⁹

9. AMOUNT OF RECOVERY.

Much conflict may arise with respect to the amount of recovery. Anglo-American law differs from that of the Hague Convention in that it does not allow a commission, nor a deduction for a discount where suit is brought before maturity. The English law on the subject of damages was settled by the Bills of Exchange Act. In this country great uncertainty continues to exist with regard to the amount of recovery not only in the matter of damages (re-exchange, charges and expenses) but also as regards the principal amount specified in the instrument.¹⁸⁰ The Negotiable Instruments Law has not attempted to regulate the subject. In many states fixed damages are prescribed by statute in lieu of the ordinary damages, charges and expenses.

In the light of such conflicting rules in the municipal law, which is the rule which shall control the rights of the holder in the Conflict of Laws?

(a) *English Law*: Before the Bills of Exchange Act the English law governing interest and damages for the non-fulfillment of the contract of the maker and acceptor, drawer and indorser,

176. Ottolenghi, p. 311.

177. Art. 38, par. 2, Uniform Law. The Convention permits each contracting state, however, to authorize the holder to refuse partial payment of instruments payable within its own territory. Art. 8 of Convention.

178. Diena, III, p. 156; Ottolenghi, pp. 303-04.

179. Chrétien, p. 173; Esperson, p. 107.

180. See Norton on Bills and Notes, 4th edition, pp. 229-35.

was that of the place where each party undertook that he himself would pay.¹⁸¹ The matter is now covered substantially by Section 57 of the Act. Although subdivision 1 of Section 57 is couched in general terms,¹⁸² it appears to apply only to bills dishonored in England.¹⁸³ The subdivision is not exhaustive, however. A foreign drawer of a bill dishonored in England by non-payment, who has paid re-exchange, may recover it from the English acceptor, and, if he is liable for re-exchange, may prove it in bankruptcy against the acceptor's estate before actual payment.¹⁸⁴ Where the bill is dishonored in England and the action is brought in an English court¹⁸⁵ not only indorsers in England but also persons who indorsed the instrument abroad would appear to be subject to the above provisions. Where the bill is dishonored abroad, subdivision 2 of Section 57 of the Bills of Exchange Act applies.¹⁸⁶

(b) *American Law*: The *lex loci solutionis* governs both as to interest and damages.¹⁸⁷ As the contracts of the drawer and indorsers are regarded as independent contracts, according to which these parties do not agree to pay at the place of payment of the bill or note, interest and damages as against them are determined by the *lex loci contractus et solutionis* of their respective con-

181. *Cooper v. Earl of Waldegrave*, (1840) 2 Beav. 282; *Gibbs v. Fremont*, (1853) 9 Exch. 25. See also Chalmers, pp. 244-45; Dicey, pp. 598-99; Mayne, Damages, Sec. 308.

182. Section 57 of the Bills of Exchange Act, subdivision 1, provides as follows: "The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

183. Chalmers, p. 195.

184. *Ex parte Roberts*, (1886) L. R. 182. B. D. 286 (C. A.), 56 L. J. Q. B. 74, 56 L. T. 599; 35 W. R. 128. See also Chalmers, p. 195; Dicey, p. 599.

185. Dicey, p. 599.

186. Section 57, subdivision 2 of the Bills of Exchange Act provides: "In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."

187. *Scofield v. Day*, (1822) 20 Johns, (N. Y.) 102; *Hawley v. Sloo*, (1857) 12 La. Ann. 815; *Austin v. Imus*, (1851) 23 Vt. 286.

tracts.¹⁸⁸ The same rule applies where a fixed amount is payable by way of damages in lieu of re-exchange charges and expenses.¹⁸⁹

(c) *French Law*: Interest by way of damages is recoverable in accordance with the *lex fori*.¹⁹⁰

(d) *German Law*: The amount of recovery by the holder and by the indorsers who may have taken up the bill, is specified in Articles 50 and 51 of the General German Exchange Law. Subdivision 1 of each of these sections allows interest at the rate of six per cent from the date of maturity or payment, and subdivision 3, a commission of one-third per cent. According to Article 52 the provisions of Articles 50 and 51, subdivisions 1 and 3, do not exclude "in cases of recourse on a foreign place, . . . the higher rates permissible at such place." Though Article 52 refers specifically to the foreign law only when it prescribes higher rates than are laid down by the German law, the principle underlying the provision is deemed to have a general operation.¹⁹¹

A thorough discussion of the subject of damages would cover many pages and cannot be undertaken in this place and only the principal points of view can be mentioned.

First view. The law of the forum should govern. This view has been accepted by Massachusetts as regards interest by way of damages,¹⁹² and also by the French Court of Cassation.¹⁹³ The doctrine is condemned by all modern jurists because it rests upon the false theory that non-contractual interest arises from the institution of the action, instead of from the non-performance of the contract.

188. *Slacum v. Pomeroy*, (1810) 6 Cranch. (U. S.) 221, 3 L. Ed. 205; *Ex parte Heidelberg*, (1876) 2 Lowell 526, Fed. Cas. No. 6322; *Crawford v. Branch Bank of Mobile*, (1844) 6 Ala. 12, 41 Am. Dec. 33; *Bailey v. Heald*, (1856) 17 Tex. 102.

A few courts hold that the drawers and indorsers agree to pay at the place of payment of the bill of note. *Bank of Illinois v. Brady*, (1843) 3 McLean 268, Fed. Cas. No. 888; *Mullen v. Morris*, (1845) 2 Pa. 85; *Peck v. Mayo*, (1842) 14 Vt. 33, 39 Am. Dec. 205.

189. *Slacum v. Pomeroy*, (1810) 6 Cranch. (U. S.) 221, 3 L. Ed. 205; *Lenning v. Ralston*, (1854) 23 Pa. 137.

190. Cass. June 10, 1857 (S. 1859. I. 751), cited by Weiss, IV, p. 391, note; Cass. April 13, 1885 (13 Clunet 459).

191. See von Bar, p. 682; Diena, III, p. 211, note; Grünhut, II, p. 580, note 40.

192. *Ayer v. Tilden*, (1860) 15 Gray (Mass.) 178, 77 Am. Dec. 355.

193. Cass. June 10, 1857 (S. 1859. I. 751), cited by Weiss, IV, p. 391, note; Cass. April 13, 1885 (13 Clunet 459).

Second view. The law of the place of performance should control. This view is held by the majority of countries and jurists. The old writers reached the result by reason of the application of the distinction which they made between the direct and indirect effects of a contract.¹⁹⁴ Under the intention theory, which underlies the modern law of obligations in the Conflict of Laws, the above conclusion is generally justified upon the ground that inasmuch as the breach occurred at the place where the payment is due, the parties must be deemed to have that law in mind.¹⁹⁵

Third view. The law of the place where the contract is entered into should determine the question. A number of writers maintain that there is no sufficient basis for a distinction between contractual and non-contractual interest. According to these writers the non-performance of the contract must have been also within the contemplation of the parties and should be governed, therefore, by the *lex loci contractus*,—the law controlling the obligation of the contract.¹⁹⁶

The writer is not convinced of the correctness of the reasoning just stated. From the mere fact that the law may assume, in the absence of evidence to the contrary, that the parties contracted with reference to the law of the place where the contract is entered into, it does not follow that all matters touching the obligation of the contract must be controlled by that law. We have seen that by common consent all matters relating directly to the mode of performance are subject to the law of the state where the performance is to take place. And it would seem most natural to assume that where the contract is broken by non-performance, the amount of interest due by way of damages should be determined by the rate prevailing at the place agreed upon for performance. The value of the performance at the time and place of performance controls generally the measure of damages in the municipal law for the reason that this rule compensates the plaintiff most nearly for the actual loss sustained. The same rule should govern in the Conflict of Laws. And this rule should control not only with reference to non-contractual interest but also with respect to the question of damages in general.

194. See, for example, Boullenois, *Traité de la Personnalité et de la Réalité des Loix*, II, pp. 477 fg.

195. Von Bar, pp. 584-85; Fiore, III, p. 258; Weiss, IV, pp. 391-92.

196. Asser, p. 81; Diena, II, pp. 81-84; Diena, III, p. 209; Ottolenghi, p. 469.

In the law of bills and notes the question remains, however, whether the damages should be determined as regards all parties by one and the same law. A number of authors are of this opinion, notwithstanding the doctrine of independence of the different contracts which they approve in general, and hold that the law of the place of payment of the bill or note should control.¹⁹⁷ They advocate this rule on grounds of convenience in order that the right of recourse between the parties may be adjusted more harmoniously than it is possible to do if the measure of damages with respect to each party is subject to the *lex loci contractus* of his particular contract. The Institute of International Law desired to reach the same end but was unwilling to sacrifice the doctrine of the independence of the different contracts in the matter of damages. It resolved, therefore, that while the different contracts are to be governed by the law of the state in which each contract is entered into, the obligation of the contracts placed upon the bill or note after its inception, should not be more extensive than that of the drawer or maker, respectively.¹⁹⁸ In this way it was sought to prevent the possibility that a party to a bill or note might be held without having a right to recover the full amount from the party creating the instrument. To the writer the solution of the problem suggested by the Institute of International Law appears wholly impracticable, and if uniformity in the amount of damages must be attained at all costs, he would prefer the law of the place of payment of the bill or note as the law governing non-contractual interest and damages with respect to all parties. He is of opinion, however, that the doctrine of the independence of the different contracts should not be abandoned in the matter of damages. In strict theory, as has been pointed out by Dean Ames,¹⁹⁹ the interest payable by the drawer or indorser in fulfillment of his contract of indemnity should run from the dishonor of the instrument to the time when it should, according to mercantile custom, be presented to the drawer or indorser, and ought to be computed at the rate prevailing at the place of dishonor; while interest payable by the drawer or indorser by way of damages for the non-fulfillment of his contract of indemnity should run only from the presentment

197. Von Bar, p. 681; Champcommunal, *Annales*, 1894, II, p. 259; Chrétien, p. 213; Esperson, p. 75; Lyon-Caen et Renault, IV, p. 561; Valéry, p. 1288; Weiss, IV, p. 467.

198. *Annuaire*, VIII, p. 121.

199. Ames, *Cases on Bills and Notes*, II, pp. 819-20.

of the instrument to the drawer or indorser and his failure to pay, and should be computed according to the rate prevailing at the place where the contract of the drawer or indorser is to be performed. This distinction is not made, however, by the American cases.

10. ACCEPTANCE AND PAYMENT FOR HONOR.

Considerable difference exists in matters of detail between the Anglo-American law and that of the Convention of the Hague as regards acceptance and payment for honor. The principles of the Conflict of Laws that should control the questions which may arise from such a difference in the municipal law, would appear to be plain. In conformity with the conclusions reached in this article the contract of the acceptor for honor, as regards his capacity, the form of the contract, and the nature, conditions and extent of his liability assumed should be subject to the law of the place where the contract is entered into. The duty of the holder of a bill of exchange to allow acceptance for honor, and the effect of such acceptance upon his rights against the different parties to the instrument should be governed, on the other hand, by the *lex loci contractus* of the different parties.²⁰⁰ This law determines likewise the duty of the holder to accept payment for honor when such payment for honor is offered at the maturity of the instrument, or subsequent thereto, and the conditions under which he is authorized to do so.²⁰¹ As regards the form in which payment for honor must be made, and the procedure to be followed, the law of the place where such payment for honor is made naturally controls.²⁰²

11. RENVOL.

All of the aforementioned rules must be understood as referring to the municipal law of the *locus contractus*, *locus solutionis*, etc., and not to the law of the state or country in its totality inclusive of its rules of the Conflict of Laws. The circumstance that the law of the place of contracting or of the place of performance may have another rule of private international law governing capacity, the formal validity or the obligation of the different contracts is therefore of no consequence.

The courts do not always bear this fact in mind. The follow-

200. Diena, III, pp. 128-29; Jitta, II, p. 124; Ottolenghi, p. 207.

201. Diena, III, pp. 157-58; Ottolenghi, p. 330.

202. Diena, III, p. 159.

ing quotation from the opinion of Judge Sanborn in *Guernsey v. Imperial Bank of Canada*²⁰³ may serve as an illustration:

"This is an action by the owner of a promissory note payable in Canada made and indorsed in Illinois to recover the amount due upon the note from the indorser. Presentment, demand and protest were made, and notice of dishonor was given in compliance with the law of Canada, but the indorser claims, and it is conceded, but neither admitted nor decided, that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered a judgment against the indorser. The latter's counsel insist that this ruling is error on the ground that the sufficiency of the notice is governed by the law of the place of indorsement, and not by the law of the place of payment. To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. *If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor.*"

The portion of the quotation which has been printed in italics accepts, in fact, the so-called renvoi doctrine, which, if generally adopted in the Conflict of Laws, would lead to great confusion. Counsel argued that the law of the place of indorsement, which was Illinois, should control the sufficiency of notice. The court's answer is that even if, for the sake of argument, counsel's contention be granted, the notice would be sufficient because it satisfied the law of the place of payment, that is, the law which would govern the question according to the rule of the Conflict of Laws adopted in Illinois. The viciousness of the reasoning consists in the fact that the law of the place of indorsement, for the application of which counsel contended, was understood by the court as including the Conflict of Laws of the state of Illinois instead of merely its law of bills and notes. The

203. (1911) 188 Fed. 300, at p. 301.

fundamental question raised is whether the rules of the Conflict of Laws should be understood as referring the judge to the municipal law of the foreign state or country, exclusive of its rules of the Conflict of Laws, or to the law of such state or country in its totality. In another place²⁰⁴ it has been shown that all Conflict of Laws rules should be understood in the former sense. A court adopting the view that the rules of the Conflict of Laws referred to the law of the foreign state or country in its totality gives up, in fact, its own convictions on the subject of the Conflict of Laws and yields to the superior wisdom of the courts of another state. Unless the rules of the Conflict of Laws administered by the courts of the forum are understood as referring to the municipal law of the foreign state, that is, in the present instance, to its law of bills and notes, instead of to the law of that state in its totality, inclusive of its rules governing the Conflict of Laws, the courts of each state might be compelled to administer as many systems of the Conflict of Laws as are in existence in the whole world. The only sound and practical view is that all rules of the Conflict of Laws be understood as referring to the municipal law of a foreign state, exclusive of its rules of the Conflict of Laws.

12. CONCLUSION.

The following is a brief summary of the conclusions reached in the foregoing study.

(a) The capacity to contract by bill or note is determined by the *lex loci contractus*.

(b) The formal or essential validity of a bill or note is determined by the *lex loci contractus*. Where a bill or note, issued out of the United States, or any supervening contract placed thereon out of the United States, conforms as regards requisites in form to the law of the United States, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United States.

(c) The interpretation and obligation of the drawing, indorsement, making, acceptance, or acceptance *supra protest* of a bill or note is determined by the law of the place where such contract is made.

204. See 10 *Columbia Law Review*, pp. 190-207, 327-44. For the literature on the subject, see also Beale, a *Treatise on the Conflict of Laws*, pp. 74-77.

Provided:

(1) That where an instrument is a negotiable bill or note under the law of its place of issue, it shall be deemed negotiable with respect to all parties.

(2) That a title to a negotiable bill or note acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties.

(d) Where a bill or note is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

(e) The sufficiency of the presentment for acceptance or payment and of the protest is determined by the law of the place where the bill or note is dishonored.

(f) The sufficiency of the notice of dishonor is determined by the law of the place from which such notice must be given.

(g) All of the above rules are to be understood as referring to the municipal law of the foreign state, exclusive of its rules of the Conflict of Laws.

ERNEST G. LORENZEN.

UNIVERSITY OF MINNESOTA.